91-610

(1)

No. ———

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals for the Second Circuit held that Section 302(c)(5) of the Labor Management Relations Act ("Section 302(c)(5)") required multiemployer pension and welfare plans to transfer assets, without transferring any liabilities, to new multiemployer plans where a few employers withdrew from the original multiemployer plans and established the new multiemployer plans with the same union.

The questions presented are:

1. Whether the court of appeals erred in applying Section 302(c)(5)—rather than the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended—as the governing law regarding such a transfer of assets from one multiemployer benefit plan to another, especially where the mandated transfer violates the governing instrument of the plan and violates one or more provisions of ERISA.

2. Whether either ERISA or Section 302(c)(5) requires a transfer of assets without a transfer of liabilities when an employer withdraws from a multiemployer pension or welfare benefit plan.

LIST OF PARTIES

All of the appellees in the proceedings below are petitioners before this Court. In addition to Local 144-Nursing Home Pension Fund, petitioners include New York City Nursing Home-Local 144 Welfare Fund, and Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney, Bartholomew J. Lawson, Fred Wilkens, William McCarthy and Marsha McLendon, as Trustees of the Local 144-Nursing Home Pension Fund and New York City Nursing Home-Local 144 Welfare Fund.

All of the appellants in the proceedings below are respondents before this Court. In addition to Nicholas Demisay, respondents include Ernest Dicker, Jack Friedman and Abraham Grossman as Trustees of the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund and Welfare Fund, Joseph Unger, as executor for the estate of Moses Unger, individually and d/b/a American Nursing Home, Abraham Grossman, individually and d/b/a Bruckner Nursing Home, Lyden Nursing Home and Williamsbridge Manor Nursing Home, B.N.H. Management Associates, Inc., Ernest Dicker, individually and d/b/a Clearview Nursing Home, Seacrest Nursing Home and Shoreview Nursing Home, Nicholas Demisay, individually and d/b/a Clove Lakes Nursing Home, Desdemona Jones Caruso, individually and d/b/a Fieldston Lodge Nursing Home, Jack Friedman, individually and d/b/a Fort Tryon Nursing Home, Franklin Nursing Home, and Friedwald House HRF, Wald Management Associates, Inc., 801 190th Street Management Associates, Inc., and 142-27 Franklin Avenue Management Associates, Inc. Respondents also include Edward Wizner, Martha Mulligan, Elizabeth Metcalf, Ivy Waite, Curlene McIntosh, Anelia Trout, Seena Moreno, Michael Heimur, Pamela Woods, Andrew Lenza, Mary Dibrienza, Euloeia Reyes, Marlene Louis, Mary Mozzolo, Fred Gerillo, Donna Jacobsen, Elsa Rivilla, Helen Leavy, Connie Caruselle, Yvonne Fernicola,

David Pabon, Cynthia Lee, Anita Harris and Mary Lindsay, as participants in the petitioner funds and respondent funds and as employees of the various respondent nursing homes.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 935 F.2d 528, and is set forth in the Appendix to the Petition ("Pet. App.") at 1a. The opinion of the United States District Court for the Southern District of New York is reported at 710 F. Supp. 58, and is set forth at Pet. App. at 13a.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was filed and entered on June 12, 1991. *See* Pet. App. at 1a. On August 21, 1991, Justice Marshall issued an order extending the time for filing this petition for certiorari to and including October 10, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and Section 302(c)(5) of the Labor-Management Relations Act of 1947 ("Section 302(c)(5)" or "LMRA"), 29 U.S.C. § 186(c)(5). Pertinent portions of these laws are set forth in the appendix hereto at 32a-53a.

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioners New York City Nursing Home-Local 144 Welfare Fund ("Greater Welfare Fund") and Local 144-Nursing Home Pension Fund ("Greater Pension Fund") (collectively, the "Greater Funds") are multiemployer benefit funds. Until 1981, the respondent employers, who are members of the Southern New York Residential Health Care Facilities Association, Inc. ("Southern Employers"), belonged to the Greater New York Health Care Facilities Association, Inc. ("Greater New York Employer Association"), a multiemployer bargaining association. As members of the Greater New York Employer Association, the respondent employers were obligated pursuant to collective bargaining agreements between Greater New York Employer Association and Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144") to contribute to the Greater Funds on behalf of their employees.

In 1981, the Southern Employers withdrew from the Greater New York Employer Association and negotiated individual contracts with Local 144 pursuant to which they continued contributing to the Greater Funds on behalf of their employees. On June 30, 1984, the Southern Employers withdrew from the Greater Funds and, after a strike, the Southern Employers and Local 144 signed a collective bargaining agreement providing for the estab-

lishment of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds").

During the 1984 collective bargaining negotiations, Local 144 resisted the establishment of the Southern Funds and warned the respondent employers that they would have sole responsibility for assuring that employees received benefits under the new funds. Ultimately, Local 144 negotiated for and obtained contractual commitments from each respondent employer that their employees would lose nothing as a result of the establishment of the Southern Funds. The collective bargaining agreement between the Southern Employers and Local 144 did not provide for the transfer of any assets or liabilities from the Greater Funds to the Southern Funds, nor were the Greater Funds parties to that agreement.

Pursuant to a requirement in the collective bargaining agreement, the Southern Pension Fund trustees voted to grant credited service earned under the Greater Pension Fund by participants who had not yet vested.[1]

The benefit plans involved in this case provide benefits to employees in the nursing home industry, a low wage sector of our economy. Like other health benefit plans, the Greater Welfare Fund has been struggling to maintain health benefit levels in the face of ever rising costs. The Greater Pension Fund provides a modest maximum pension of $350 per month. This case does not raise issues regarding excess assets in benefit plans.

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[1] The employees of the Southern Employers did not accrue benefits in any pension plan between July 1, 1984, and November 30, 1985, because the Southern Pension Fund did not become operational until December 1, 1985. The Southern employers continued to contribute to the Greater Welfare Fund until September 30, 1985, and that Fund provided welfare benefits for the Southern employees until December 1, 1985, the operational date of the Southern Welfare Fund.

The Greater Funds have paid, and continue to pay, all benefits to which their participants are entitled, including benefits to which employees of the Southern Employers are entitled. In other words, the Greater Funds have retained all the liabilities they had to the employees of the Southern Employers who had been plan participants.

B. The Proceedings Below

The respondents initiated this action against petitioners in the United States District Court for the Southern District of New York in August 1985. The respondents contended that the Greater Funds' failure to transfer a portion of their plan assets to the Southern Funds constituted a "structural defect" in violation of Section 302(c)(5).[2] The respondents also contended that the trustees of the Greater Funds breached their fiduciary duties under ERISA, 29 U.S.C. § 1104(a), by not transferring a portion of the Greater Funds' assets to the Southern Funds. The respondents further contended that the Greater Funds violated ERISA, 29 U.S.C. § 1414, because the governing plan documents did not contain provisions requiring an asset transfer. Respondents and petitioners both filed motions for summary judgment on the above

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[2] Specifically, the respondents claimed that:

> [I]n order to comply with Section 302(c)(5) the Greater New York Pension Fund must recognize that its assets are attributable, in corresponding amounts, to the *contributions made by each contributing employer*. Further, *the Greater New York Pension Fund must utilize those assets solely to benefit the employees of each particular contributing employer*. . . . Otherwise, the Greater New York Pension Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made.

Response of respondents/plaintiffs to petitioners'/defendants' First Set of Interrogatories (emphasis added). Respondents made the same assertion regarding the Greater Welfare Fund (Joint Appendix at 388a-391a, 935 F.2d 528 (2d Cir.)).

claims. Petitioners also filed a motion to dismiss for lack of standing and jurisdiction.

On March 15, 1989, the District Court denied respondents' summary judgment motion, granted petitioners' motion for summary judgment on the first two claims, and dismissed the third claim for lack of standing. The District Court concluded that "any transfer here would be for the primary benefit of employers, not the employees" and that Congress did not intend to benefit employers. Pet. App. at 20a-21a. Further, the District Court, referring to ERISA, concluded that "[b]ecause Congress has specifically legislated in this area and has decided when a transfer of assets and liabilities is mandated, the Court should not and cannot expansively interpret LMRA Section 302(c)(5) so as to accomplish that result." Pet. App. at 26a. Finally, the District Court held that ERISA's asset transfer provisions were inapplicable because there had been no transfer of liabilities and the employees had not changed their bargaining representative. Pet. App. at 26a.

Respondents appealed that decision to the Court of Appeals for the Second Circuit. On June 12, 1991, the Second Circuit reversed the judgment of the District Court on the first claim, holding that unless plan assets attributable to employees whose employers withdrew from the Greater Funds and joined the Southern Funds were transferred to the Southern Funds, the Greater Funds would "suffer from a 'structural defect'" in violation of Section 302(c)(5). Pet. App. at 11a. The Second Circuit remanded with instructions to enter partial summary judgment for respondents and to determine the amounts of plan assets to be transferred to the Southern Funds. The Second Circuit found it unnecessary to reach the merits of the two remaining claims.

REASONS FOR GRANTING CERTIORARI

This case presents a fundamental question regarding the regulation of assets of employee benefit plans: whether ERISA or Section 302(c)(5) governs the transfer of plan assets from and between employee benefit plans. The decision of the Second Circuit also warrants review as it presents the important question of whether Congress intended Section 302—a criminal statute—to authorize the federal courts to regulate the transfer of assets of benefit plans. Underlying these important legal issues is their significant impact on the financial integrity of employee benefit plans covering millions of participants in multiemployer plans and the integrity of ERISA as the congressional articulation of national policy regarding employee benefit plans. In addition, there is a conflict of positions between the Second Circuit and other courts of appeal, as discussed below.

I. IN HOLDING THAT SECTION 302 OF THE LMRA GOVERNS THE TRANSFER OF ASSETS FROM EMPLOYEE BENEFIT PLANS, THE SECOND CIRCUIT DISREGARDED AND UNDERMINED THE CONGRESSIONAL SCHEME FOR THE REGULATION OF EMPLOYEE BENEFIT PLANS

In ERISA, Congress specifically considered the subject of plan asset transfers, provided detailed rules concerning it, and deliberately decided not to impose a transfer of assets requirement except in one circumstance[3] not relevant in the case at bar. ERISA, 29 U.S.C. §§ 1103, 1104, 1106, 1108, 1411-1415. Nevertheless, the Second Circuit based its decision entirely on an expansive interpretation of Section 302(c)(5)—a statute enacted decades earlier than ERISA and which does not even address

[3] Congress mandated a transfer of assets and liabilities only when the employer withdrawal is the result of a certified change of bargaining representative. 29 U.S.C. § 1415. Since Title IV of ERISA applies only to pension plans, *see* 29 U.S.C. §§ 1301-1461, references to Title IV herein apply only to the Greater Pension Fund.

transfers of assets between plans—to hold that plan assets of the Greater Funds be transferred to the Southern Funds. The Second Circuit ordered this transfer notwithstanding the fact that Congress had enacted ERISA to be what this Court called the "comprehensive and reticulated statute" to regulate employee benefit plans. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

Unless a contrary congressional intent is manifest, the congressional enactment of a comprehensive body of rules warrants the conclusion that those rules control where prior general statutory provisions may arguably touch on the subject matter. Particularly pertinent here is this Court's reasoning in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979). In *Daniel*, the question was whether disclosure requirements under the law relating to securities were applicable to pension plans. This Court held that the "existence of this comprehensive legislation [ERISA] governing the use and terms of employee pension plans severely undercuts all arguments for extending" the federal securities law to pension plans. 439 U.S. at 569-70. This Court noted that:

> If any further evidence were needed to demonstrate that pension plans of the type involved are not subject to the Securities Acts, the enactment of ERISA in 1974, 88 Stat. 829, would put the matter to rest. Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. ERISA requires pension plans to disclose specified information to employees in a specified manner, see 29 U.S.C. §§ 1021-1030, in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts.

Id. at 569 (citations omitted).

The reasoning of this Court in *Daniel* applies with even greater force in the present case. The general lan-

guage of Section 302(c)(5) is in stark contrast to ERISA's comprehensive, detailed treatment of a specific question involved here, i.e., transfers of assets between multiemployer pension plans. Indeed, ERISA provides a detailed regulatory framework for dealing with the transfer of plan assets and the return of contributions to employers. 29 U.S.C. §§ 1103(c)(1) and (2), 1104(a)(1)(A) and (D), 1106(a)(1)(D), 1108(b)(11) and 1411-1415. The Second Circuit effectively ignored those provisions of ERISA, relying exclusively on Section 302(c)(5) to discern basic policies regulating employee benefit plans, even though ERISA is Congress' only comprehensive legislation in the field.

II. IN MANDATING A TRANSFER OF ASSETS WHERE THERE IS NO TRANSFER OF LIABILITIES, THE SECOND CIRCUIT HAS APPLIED A POLICY WITHOUT BASIS IN THE LANGUAGE OR LEGISLATIVE HISTORY OF THE LMRA

The Second Circuit's approach in this case is a classic example of the usurpation of the legislative process. The Second Circuit construed the "sole and exclusive" language in Section 302(c)(5) to require that an employer's contributions to a multiemployer benefit plan be used solely for the benefit of that particular employer's employees—at least in certain circumstances. In so doing, the Second Circuit applied Section 302(c)(5) to mandate that the Greater Funds transfer assets to the Southern Funds even though liabilities were not transferred.

Even if Section 302(c)(5) were applicable, a reasonable interpretation of its language would not require a transfer of assets in the case at bar. In the very statute relied upon by the Second Circuit, Congress said that employer contributions can be used not only for the "benefit of the employees of such employer," but also for "the employees of other employers making similar payments." Section 302(c)(5). The plain meaning of the

statute is that contributions of an employer may be applied to the benefit of employees of other contributing employers, as well as to the benefit of the employees of the particular contributing employer. Moreover, this Court has noted that there is not "any restriction on the allocation of the funds among the persons protected by § 302(c)(5)." *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 572 (1982). Further support is found in the Internal Revenue Code, which provides that, with respect to multiemployer plans, "in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries, all plan participants shall be considered to be his employees." 26 U.S.C. § 413(b)(3). That is the fundamental principle on which multiemployer plans are based. Uncontroverted expert testimony in the record establishes that the Second Circuit's holding would undermine that fundamental principle and thereby undermine multiemployer benefit plans throughout the nation.[4]

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[4] Professor Dan M. McGill of the Wharton School of Finance, University of Pennsylvania, the foremost American academic scholar on employee benefit plans, stated that "diversion of multiemployer pension plan assets to . . . follow the employer and his employees when they leave the multiemployer plan . . . would be inconsistent with the basic concepts of multiemployer plans." McGill Affidavit (Joint Appendix at 270a-271a).

Mr. A. H. Higgs, Jr., Vice President of the Martin E. Segal Company, which firm serves about half of all multiemployer plan participants in the United States, pointed out that

> The contribution rate for a multiemployer plan is . . . determined on a uniform basis planwide . . . without regard to their employer or his employees' characteristics. . . . If the contributions of a particular employer in excess of the value of health benefits provided to the employer's employees were required to be paid out of the multiemployer plan to the benefit of that employer when the employer left the plan, only employers with a positive balance would likely choose to leave the plan and take

Indeed, there is not a scintilla of evidence in the statutory language or otherwise that Congress intended to require the transfer of assets mandated by the Second Circuit. The legislative history of Section 302 of the LMRA is completely barren of such evidence; the legislative history of ERISA clearly indicates that Congress intended to restrict transfers of assets from employee benefit plans generally and from multiemployer pension plans in particular.

This is not a case where Congress overlooked the eventuality of one plan claiming a transfer of assets from another plan. Congress considered transfers of assets in enacting ERISA, but decided to mandate a transfer in only a single circumstance, where the employer withdrawal is the result of a certified change of bargaining representative, 29 U.S.C. § 1415, and there was no change in the bargaining representative here. In ERISA, Congress specified, in detail, procedures and rules to govern such a transfer of assets and liabilities and made a transfer subject to review by a Federal agency, the Pension Benefit Guaranty Corporation. 29 U.S.C. § 1411. In particular, Congress required that any such asset transfer be accompanied by a transfer of liabilities.[5]

> assets from it. Employers with a negative balance would stay put, continuing to incur costs greater than their contributions. This is a classic case of the impermissible practice known to insurers as adverse selection.

Higgs Affidavit (Joint Appendix at 241a-242a, 244a-245a). If such adverse selection were forced upon it, a multiemployer plan would suffer the actuarial losses but would not have the benefit of the actuarial gains to offset the actuarial losses. Any employee benefit plan or insurance company in that situation cannot long survive.

[5] In fact, not only does the congressional scheme mandate that no plan assets be transferred without a corresponding transfer of liabilities, but also there are specified circumstances when "a transfer of assets from the old plan to the new plan is prohibited"—and even though an asset transfer is prohibited, "the old plan shall transfer" certain liabilities to the "new plan." 29 U.S.C. § 1415 (e)(1) and (2). Thus, although Congressional policy requires a transfer of assets only when accompanied with a transfer of lia-

Nevertheless, the Second Circuit applied Section 302(c)(5) to require the Greater Funds to transfer to the Southern Funds that portion of their plans' assets "which represents contributions on behalf of the Southern Employees for liabilities now undertaken by the Southern Funds." Pet. App. at 11a. Note the word "undertaken" used by the Second Circuit. The District Court concluded that "there has been no transfer of liabilities from the Greater Funds to the Southern Funds," Pet. App. at 24a, and the Second Circuit did not modify that finding as, indeed, it could not.[6] As the District Court correctly noted, "an assumption of liability for welfare benefits and past service credit by the Southern Funds is not the same as a transfer of liabilities from the Greater Funds to them, since the latter implies that the Greater Funds had a preexisting obligation to those who left the plan, which is simply not the case here." Pet. App. 24a.

The Second Circuit's construction of Section 302(c)(5) is a cancer that has the power to kill multiemployer benefit plans.[7] The Ninth Circuit, in rejecting the position that the Second Circuit has adopted here, expressly observed that:

> Because any multiemployer trust fund might result in one employer's payments covering the claims of another employer's employees, the Employers' argument leads inexorably to the conclusion that all multiemployer trust funds violate the "sole and exclusive benefit" rule of subsection 302(c)(5).

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bilities, in certain circumstances it requires the transfer of liabilities even in the absence of a transfer of assets.

[6] A transfer of liabilities requires the diminution of the liabilities of the transferor plan and the assumption of those liabilities by the transferee plan. 29 C.F.R. § 2670.3 (1987); 26 C.F.R. § 1.414(l)-1(b)(3) (1991).

[7] *See supra* n.4.

British Motor Car Distribs., Ltd. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371, 378 (9th Cir. 1989).[8]

The Second Circuit's decision is at cross-purposes with congressional policy because it operates to protect the interest of employers in derogation of the interests of the plans at issue. This Court has observed that Section 302(c)(5) of the LMRA was "meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders" and that "Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making direct or indirect payments to unions or union officials." *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 571-72 (1982). *See also NLRB v. Amax Coal Co.*, 453 U.S. 322, 331 (1981); *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). In the present case, as the District Court noted, "there has been no allegation of corruption." Pet. App. at 23a.

Yet, the Second Circuit held that the failure of the Greater Funds to transfer assets so as to relieve the financial obligations of the Southern Employers does not comply with Section 302(c)(5). In the words of the District Court, "it is the [Southern] employers who have chosen to create a new fund" thereby causing "the obli-

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[8] The United Mine Workers Health and Retirement Funds is a dramatic example. As the Executive Summary to the November 1990 Report of the Secretary of Labor's Advisory Commission on the United Mine Workers of America Retiree Health Benefits stated, "more than half of the Funds' population is composed of orphan retirees" (i.e., participants whose former employers no longer contribute to the Fund). If an employer's contributions must be used only for the benefit of the contributing employer's employees, other participants in the plan would likely find themselves without benefits. In fact, congressional policy is precisely the opposite.

gation *they* assumed because *they* chose to create a new plan. It would indeed be anomalous to permit an employer to willingly assume obligations for its own purposes and then to use the financial pressures of that choice to force a transfer of assets from the plan from which it has chosen to withdraw." Pet. App. at 21a (emphasis in the original). Nevertheless, the Second Circuit delineated the amount of the required asset transfer by the "liabilities now undertaken by the Southern Funds" even though there has been no transfer of liabilities.[9]

Basic policy should be made by Congress through the legislative process, not by the courts. If the LMRA could be construed as mandating a transfer of money from one multiemployer plan to another, significant issues would be raised for every multiemployer plan in the nation regarding the scope and implementation of such a mandate.[10] For example, it would be necessary to decide whether a multiemployer plan should be required to transfer money if it had provided benefits to the withdrawing employers' employees in excess of the value of their employers' contributions,[11] or if the consequences of transferring plan assets would leave the transferor multiemployer plan in such financial distress that it would jeopardize the benefits of participants who remain in the transferor plan, or if any plan assets are to be trans-

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[9] *See* discussion regarding transfer of liabilities, *infra* pp. 10-11.

[10] The ramifications of the Second Circuit's decision may be felt by single employer plans, too, since the Second Circuit's view that employer contributions to a benefit plan must follow the employer and its employees apparently is not limited to multiemployer plans. *See Trapani v. Consolidated Edison Employees' Mutual Aid Society, Inc.*, 891 F.2d 48 (2d Cir. 1989).

[11] If the withdrawing employers' employees had received benefits exceeding their employers' contributions to the plan, would it not be equitable for the withdrawing employers to pay the plan the excess? However, Congress has enacted in ERISA a detailed set of rules requiring a totally different computation of withdrawal liability to be paid to a multiemployer pension plan by a withdrawing employer. 29 U.S.C. §§ 1381-1405.

ferred without the transfer of liabilities. These are all policy questions for the Congress.[12]

III. THE SECOND CIRCUIT'S MANDATE REQUIRING THE GREATER FUNDS TO TRANSFER ASSETS TO THE SOUTHERN FUNDS VIOLATES ERISA

By requiring the Greater Funds to transfer a significant portion of its assets to the newly-established Southern Funds, the Second Circuit is requiring conduct that violates ERISA. Whereas Title I of ERISA bars the use of plan assets to benefit employers,[13] the Second Circuit is mandating that plan assets be so used. Whereas Title I requires plan fiduciaries to administer the plan in accordance with the plan's governing documents,[14] the Second Circuit is requiring employee benefit plans to pay out money in violation of the plans' governing documents. Whereas Title IV of ERISA requires a withdrawing employer to pay a multiemployer pension plan withdrawal liability,[15] the Second Circuit is requiring that the plan from which the Southern employers withdrew pay money to the benefit of the withdrawing Southern employers.

The Second Circuit held that in its view the Greater Funds' failure to transfer assets to the Southern Funds violated Section 302—even though the conduct of the Greater Funds and their trustees are wholly consistent with their trust instruments and with the applicable rules in ERISA on asset transfers. Since Section 302 is a criminal statute, the Second Circuit is suggesting that, technically, the Greater Funds have committed a criminal act by complying with their governing trust instruments and with ERISA, both of which bar the plan asset transfers the Second Circuit says Section 302(c)(5) requires.

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[12] In the single circumstance where Congress has mandated such a transfer, the Congress has provided guidance on each of those policy questions. 29 U.S.C. § 1415.

[13] *See* discussion *infra* pp. 15-16.

[14] *See* discussion *infra* p. 16.

[15] *See* discussion *infra* p. 16.

With the passage of ERISA, Congress expressly prohibited the employer/plan sponsor from using the assets of the plan for its own benefit. ERISA limits the use of plan assets to "providing benefits" and "defraying reasonable expenses," which does not include transfers of assets for the benefit of employers or for participants in other plans. 29 U.S.C. § 1104(a)(1)(A). Further, ERISA mandates that "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. § 1103(c)(1); *see also* 29 U.S.C. §§ 1106(a)(1)(D) and 1108(b)(11).

The District Court concluded that the transfer of assets sought by respondents would be for the benefit of the Southern employers. Pet. App. at 20a-21a. It is clear that any transfer of assets from the plans from which the plaintiff employers withdrew to the new plans will diminish the need for the respondent withdrawing employers to contribute to the new plans. Indeed, those employers admitted at deposition that that was their purpose in bringing this action. Moreover, the Internal Revenue Service ("IRS") has ruled that the transfer of assets from one multiemployer plan to another constitutes "income" to the contributing employers in the receiving plan. IRS Priv. Ltr. Rul. 89-48-302 (Sept. 6, 1989); *see also* IRS Priv. Ltr. Rul. 91-36-017 (June 10, 1991). That concept is underscored by the fact that it is the withdrawing employers themselves, and not the new Southern plans, that brought the present action.

ERISA provides specific rules regarding the return of contributions to employers. 29 U.S.C. § 1103(c)(2). However, there is no contention in the present case that there was an entitlement to the return of contributions pursuant to those provisions of ERISA, and indeed, there is no such entitlement. Insofar as the Second Circuit is effectively requiring a return of employer contributions, there is a clear conflict in the circuits. The Ninth Circuit has held that there is no right of action under Section 302(c)(5) of the LMRA for return of employer con-

tributions to an employee benefit plan; that court held that such a right of action is available only under Section 403(c)(2) of ERISA. *Award Serv. Inc. v. Northern California Retail Clerks Union & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir. 1985).

ERISA requires plan fiduciaries to administer the plan "in accordance with the documents and instruments governing the plan," 29 U.S.C. § 1104(a)(1)(D), and the trust instruments here clearly bar the transfers.[16] The Second Circuit ordered the transfers in clear contravention of those documents.

Furthermore, with the enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208 (Sept. 26, 1980), Congress amended ERISA to provide greater protection for multiemployer plans. MPPAA includes a very narrow exception to the fundamental rule that assets of a plan cannot be applied to the benefit of the employer. ERISA provides that "a plan sponsor may not cause a multiemployer plan to . . . engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such . . . transfer satisfies the requirements of subsection (b)." 29 U.S.C. § 1411. There is no contention that these statutory prerequisites for such a transfer have been met in the present case.

ERISA provides that if an employer withdraws from a multiemployer pension plan, "then the employer is liable to the plan in the amount determined . . . to be the withdrawal liability." 29 U.S.C. § 1381. Thus, the

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[16] Virtually all multiemployer benefit plan trust instruments bar such transfers. In the courts below, respondents argued that multiemployer pension plans must have rules allowing transfer of assets and liabilities. However, that is so only if the transferor plan desires to make such a transfer. 29 U.S.C. § 1414. The Pension Benefit Guaranty Corporation and the only court of appeals to rule on the point support the view that it is a voluntary choice of the transferor plan. *Vornado, Inc. v. Trustees of the Retail Store Employees Union Local 1262*, 829 F.2d 416 (3d Cir. 1987).

statute seeks to protect such plans by providing that an employer that ceases participation in a plan faces the prospect of withdrawal liability—liability *to* the plan for the employer's share of the plan's unfunded liabilities, rather than as the Second Circuit required here, payments by the plan for the benefit of the employers who withdrew. Furthermore, insofar as the Second Circuit is holding that withdrawing employers are entitled to a proportionate share of the Greater Funds' assets, the position of the Second Circuit is in conflict with the Seventh Circuit's position "that Section 302(c)(5) 'does not require that an employee, employer, group of employers or union be given a proportionate share of a trust fund's assets simply because a decision is reached to cease participation in the trust.'" *Stinson v. Ironworkers Dist. Council of S. Ohio & Vicinity Benefit Trust*, 869 F.2d 1014, 1018 (7th Cir. 1989) (quoting with approval from the district court's opinion).

CONCLUSION

Fundamental to this case is the interplay between ERISA and Section 302(c)(5) of the LMRA regarding the regulation of employee benefit plans. The present case is an excellent vehicle for the clarification of the controlling law.

It is evident from the above, that the issues involved in the present case are not parochial ones. On the contrary, as indicated above, they are critical to the financial integrity of employee benefit plans covering millions of participants and involve the integrity of ERISA as the congressional articulation of national policy regarding employee benefit plans. These are matters of vital concern to a significant part of the private pension system in the United States.

For the foregoing reasons, petitioners respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX
TO THE PETITION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1051 August Term 1990

Argued: March 4, 1991 Decided: June 12, 1991

Docket No. 90-7894

NICHOLAS DEMISAY, *et al.*,
Plaintiffs-Appellants,

-against-

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Defendants-Appellees.

BEFORE: KEARSE, PRATT, and McLAUGHLIN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, John E. Sprizzo, *Judge*, granting summary judgment on two claims in favor of defendants and dismissing a third claim for lack of standing.

Reversed and remanded.

PRATT, *Circuit Judge*:

In *Local 50, Bakery and Confectionery Workers Union, AFL-CIO v. Local 3, Bakery and Confectionery Workers Union, AFL-CIO*, 733 F.2d 229 (2d Cir. 1984), we held that one union's health benefits trust fund was required to transfer certain monies to another union's health bene-

fits trust fund when all the employees of an employer had shifted their union allegiance from one union local to another. Today, we must revisit that problem in a slightly different context, where an employer leaves one set of multi-employer trust funds in favor of a different set of trust funds.

Specifically, the question before us is whether, when an employer leaves pension and welfare trust funds in favor of another set of trust funds, § 302(c)(5) of the Labor Management Relations Act ("LMRA") requires a reallocation of monies paid to the former funds on behalf of its employees, so that the monies are used "for the sole and exclusive benefit of the employees of such employer" as those terms are used in § 302(c)(5). Because we believe that absent some reallocation of monies, the former fund would suffer from a "structural defect", we reverse the judgment of the district court and remand with instructions to enter partial summary judgment in favor of the plaintiffs.

BACKGROUND

The appellants are management trustees, employers and management companies ("Southern Trustees", "Southern Employers" and "Southern Management Companies", respectively) which comprise the membership of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds"), and employees ("Southern Employees") of the Southern Employers. Until 1981, the members of the Southern Funds were members of the Greater New York Health Care Facilities Association, Inc. ("Greater New York"), a multiemployer bargaining association, and were parties to collective bargaining agreements between Greater New York and Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144"). Pursuant to those agreements, the Southern Employers were required to and did con-

tribute to pension and welfare funds established for the benefit of employees of the Greater New York employers ("Greater Funds", or separately, "Greater Pension Fund" and "Greater Welfare Fund").

The relationship between the Southern Employers and Greater New York ended in 1981, when the Southern Employers withdrew their membership in Greater New York. Upon their leaving Greater New York, the Southern Employers executed their own collective bargaining agreements with Local 144, agreements which obligated the Southern Employers to continue contributing to the Greater Funds on behalf of their employees.

This arrangement lasted until 1984, when the Southern Employers decided also to withdraw from the Greater Funds and, along with B.N.H. Management Associates, Inc., to establish their own pension and welfare funds. The Southern Employers then negotiated with Local 144 for a new collective bargaining agreement that allowed the new funds to be established. On November 30, 1984, the parties to that agreement provided for the establishment of the Southern Funds.

The agreement contained no provisions mandating a transfer of reserve funds from the Greater Funds to the Southern Funds. The agreement did provide, however, that (1) members of or contributors to the Southern Funds could sue to compel such a transfer, and (2) Local 144 would not oppose such a suit, provided that the suit was "consistent with applicable law."

The agreement clearly illustrates that Local 144's primary concern was to assure that none of its members would suffer a loss of benefits as a result of the Southern Employers' change from the Greater Funds to the Southern Funds. To this end, the agreement provided not only for a continuity of benefits for covered employees, but also contained a requirement that the Southern Funds would provide the same level of benefits as had the Greater Funds. The Southern Employers were required

to contribute to the Greater Welfare Fund until a date two months prior to the Southern Funds' operation. Additionally, the Greater Pension Fund ceased to accrue pension credits for the Southern Employees on July 1, 1984. The Southern Employers made pension contributions after July 1, 1984 to an escrow account maintained for the purpose of building reserves for the Southern Funds.

The Southern Funds were established on October 18, 1985, with the execution of trust agreements. The trustees of the new funds agreed that the Southern Funds would become operational on December 1, 1985. On November 5, 1985, the Southern Trustees agreed that the Southern Pension Fund would fully recognize all years of credited service earned by participants who had not yet vested under the Greater Pension Fund. Those employees who had vested under the Greater Pension Fund, since they would receive a partial pension from that fund, would be provided a supplemental portion of their ultimate benefit by the Southern Pension Fund, so that they would receive the same total benefit, but part would be paid by the Greater Pension Fund, where they were already vested, and the remainder or supplemental portion would be paid by the Southern Pension Fund.

To help finance this change from the Greater Funds to the Southern Funds, plaintiffs desired to have portions of the reserves in the Greater Funds that represented contributions on behalf of the Southern Employees transferred to the Southern Funds. To that end, plaintiffs filed this action in the district court, claiming (1) that the Greater Funds' trust documents, because they failed to provide for a transfer of a portion of their reserves to the Southern Funds, suffered from a "structural defect" which violated § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5); (2) that the failure of the Greater Funds to provide asset transfer rules violated § 4234 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1414; and (3) that the defend-

ant Greater Fund trustees had breached their fiduciary duties under § 404 of ERISA, 29 U.S.C. § 1104.

In an opinion reported at 710 F. Supp. 58 (S.D.N.Y. 1989), the district court denied the plaintiffs' motion for partial summary judgment, granted the defendants' motion for summary judgment on the first and third claims, and dismissed the plaintiffs' second claim for lack of standing. On the first claim, involving § 302(c)(5), the district court distinguished our decision in *Local 50*, noting that the *Local 50* panel was influenced by policy concerns regarding collective bargaining. *Local 50* involved *employees* who had changed bargaining representatives (and, hence, health benefit funds), while here, it was the *employers* who had initiated the change of funds. Consequently, the district court held, "[t]he absence of those [collective bargaining] considerations requires a different result here." *Id.* at 63. The plaintiffs renew their arguments on appeal.

DISCUSSION

A. *ERISA or LMRA: Which Controls?*

As an initial matter, we must consider the appellees' contention that ERISA, not the LMRA, controls this appeal, since ERISA is a "comprehensive and reticulated" statute, *cf. Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62 (1980), and as a specific statute, must be given precedence over a more general one. Some background on this statutory scheme is necessary to understand how the statutes relate to each other.

In 1980 Congress passed the Multiemployer Pension Plan Amendments Act ("MPPAA"), which, *inter alia*, added § 4235 of ERISA, 29 U.S.C. § 1415, to require the transfer of assets and liabilities from one pension plan to another when a change in pension plans comes about "as a result of a certified change of collective bargaining representative." Since the MPPAA was silent on transfers resulting from other scenarios, the appellees argue that Congress must have meant for asset transfers to

occur *only* when the change is triggered by a certified change of collective bargaining representative; thus § 302(c)(5), in the appellees' view, cannot be read to make a structural defect out of a failure to transfer assets in situations not covered by § 4235 of ERISA.

We reject this argument. First, the proposition that a specific statute controls a general one applies only when the statutes are irreconcilable. When two statutes can live a peaceful coexistence, we must give effect to both of congress's commands. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Romano v. Luther*, 816 F.2d 832, 840 (2d Cir. 1987). It is well established that trust funds such as the ones at hand are governed *jointly* by the LMRA and ERISA; thus, both statutes not only can, but must, apply. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 561-62 (1985); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 366 n.1 (1984).

Second, to give § 302(c)(5) such a narrow reading, we would have to overrule our prior decision in *Local 50*, which held that section to be applicable and which found a structural defect where there had been a failure to transfer funds. The appellees suggest as much when they invite us to "modify" our previously-stated views. Appellees' Brief at 47. Since we decline the invitation, the appellees, in order to succeed, must show not only *Local 50*, but also our prior decisions in *Trapani v. Consolidated Edison Employees' Mutual Aid Soc'y, Inc.*, 891 F.2d 48 (2d Cir. 1989) and *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985), to be distinguishable. This they fail to do.

B. *Local 50*

In *Local 50*, we held that a union's health benefits fund was required to transfer, to a successor union's health benefits fund, that portion of the reserves attributable to those employees who "shifted their union

allegiance from one local to another." 733 F.2d at 230. Before reaching the merits of the case, however, we noted:

> On its face, this case deals with the rights of employees to reap the benefits of employer contributions made in lieu of wages. Viewed in this light, the problem here might be considered one of entitlement on the part of Entenmann's employees or, alternatively, unjust enrichment of those workers who retain Local 50 as their collective bargaining representative.
>
> Yet a more fundamental problem exists—one that strikes at the very core of collective representation. Specifically, were we to hold that Local 50 may retain the contributions made by Entenmann's on behalf of its employees, we would be imposing a great disincentive for employees ever to change bargaining representatives. Faced with the devil's alternative of either forfeiting their right to a substantial sum of employer contributions or retaining a collective bargaining representative with which they are less than satisfied, employees may well choose the latter. Such a result would not only impinge on free choice in representation, but would also permit unions without penalty to them to become less attentive to their constituencies' demands. * * * We see no necessity to make employees choose between two such bad bargains.

Id. at 233 (citation omitted).

The district court concluded that this language meant our decision in *Local 50* required a transfer of reserves only when it would (1) benefit employees and (2) absent a transfer, burden the employees' choice of bargaining representative. 710 F. Supp. at 63. While the appellees and the district court correctly recognized these concerns we had in *Local 50*, it does not follow that these concerns dictate a different result in this case. In *Trapani*, where

the change was initiated by an employer rather than by employees, we found "stronger equitable considerations in favor of plaintiffs than in *Local 50*" for the very reason that the employees had no say in the change of funds. *Trapani*, 891 F.2d at 50.

The district court also relied heavily on the fact that the new collective bargaining agreement with Local 144 contractually obligated the Southern Employers to provide the same level of benefits as the Greater Funds would have provided: "[T]hat circumstance is the consequence of the obligation *they* assumed because *they* chose to create a new plan." 710 F. Supp. at 63 (emphasis in original). According to the appellees, the Southern Employers backed their promise to Local 144 with their own assets, and thereby made a transfer of funds unnecessary for the protection of the employees.

This argument falls wide of the mark. We are being asked to interpret not a collective bargaining agreement, but a statute. Regardless of the terms of the agreement between the Southern Employers and Local 144, the fact that the Greater Funds hold pension and welfare contributions which will never result in benefits for the unvested employees is still a structural defect under § 302(c)(5). *See Local 50*, 733 F.2d at 235. As Senator Taft, one of the sponsors of the LMRA, remarked: "In other words, this must be a *trust* fund . . . it is in trust for the employees, who, after all have earned the money." 93 Cong. Rec. 4746 (1947), *reprinted in* 2 *Legislative History of the Labor Management Relations Act, 1947*, at 1311 (1948) (emphasis added). *See also id.* at 1498 (remarks of Sen. Ball), *quoted in Local 50*, 733 F.2d at 235.

C. *Section 302(c)(5) of the LMRA: "Sole and Exclusive Benefit"*

The district court did not fully appreciate that the "sole and exclusive benefit" provision of § 302(c)(5) recognizes that payments into a trust fund are in exchange for employees' labor, just as wages are, and should be protected

so that employees may enjoy the "sole and exclusive benefit" of their efforts. *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 570-72 (1982); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 328, 331 (1981); *Local 50*, 733 F.2d at 236. There is no requirement that an employer establish trust funds to benefit its employees; absent a contractual obligation, an employer could use these same funds to pay higher wages to its employees:

> If an employer agreed to give five cents to a union trust fund for every hour of work by an employe, the hourly wage paid directly to the employe would be five cents less. It is only just, said Congress, that the employe whose hour's work required the employer to make a payment of five cents to the trust fund be assured of reaping the benefit of that payment.

Bey v. Muldoon, 223 F. Supp. 489, 495 (E.D.Pa. 1963), *aff'd*, 354 F.2d 1005 (3d Cir.), *cert. denied*, 384 U.S. 987 (1966).

Section 302(c)(5)'s "sole and exclusive benefit" provision puts the force of law behind the principle that wages withheld by an employer should benefit the employees who earned those wages. Otherwise, the excess funding would operate as a windfall to the Greater Funds, a windfall which could be misused as the drafters of § 302(c)(5) feared. *See NLRB v. Amax Coal Co.*, 453 U.S. at 330 n.13; *International Brotherhood of Teamsters, Joint Council 18 v. New York State Teamsters Council Health & Hospital Fund*, 903 F.2d 919, 922 (2d Cir.), *cert. denied*, 111 S. Ct. 251 (1990).

Nevertheless, the appellees argue, the "sole and exclusive benefit" requirement is not violated here, because § 301(c)(5), which allows employers to pay money to their employees' representatives only "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other

employers making similar payments, and their families and dependents)", means that the monies may remain in the Greater Funds to benefit those employees whose employers did not change to the Southern Funds.

To support this argument, the appellees enlisted the aid of an expert at the district court, as well as two *amici curiae* in this court. All three have pointed out, correctly, that multi-employer plans are cost-sharing devices which pool funds. In theory, "any multiemployer trust fund might result in one employer's payments covering the claims of another employer's employees," *see British Motor Car Distributors v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989); therefore, so the argument goes, there is no right to reallocate monies which were placed in a multiemployer fund just because the monies had not yet been used for the payment of benefits.

This argument also misses the point of the "sole and exclusive benefit" requirement. Our holding today does not, as the appellees and *amici* fear, require multiemployer funds to tie the benefits of employer-participants to their individual contributions. It requires the reallocation of only those reserves that are attributable collectively to the labor of the employees whose employers have left the umbrella of the Greater Funds for that of the Southern Funds.

We have previously noted that, contrary to the fears of appellees and *amici*, the benefits of individual employees need not be tied to their individual contributions. In *O'Hare*, which we decided only three months after *Local 50*, we refused to find a § 302(c)(5) structural defect where *some*, but not all, of an employer's employees voluntarily changed unions, thus changing welfare and pension plans. We said:

> To claim that monies retained by the Funds contributed by an employer on behalf of all its employees [are] not contributed "for the sole and exclusive

> benefit of the employees of such employer" whenever some of the employees choose to leave the union and fund would be an unfair and unrealistic construction of section 302(c)(5). This is especially true when considering pension funds, where financing is based on long-range actuarial projections and vesting requirements which assume that some employees for whom contributions are made will never be eligible for benefits.

O'Hare, 740 F.2d at 173. However, when all the employees of an employer are removed from a fund, there is no chance, actuarial or otherwise, that any of the "employees of such employer" (with the obvious exception of the already-vested pensioners) will ever receive benefits based on their contributions. *Local 50*, 733 F.2d at 236. Thus, the only way that the Southern Employees could ever receive the "sole and exclusive benefit" of their employers' contributions to the Greater Funds on their behalf would be to mandate a reallocation of reserves from the Greater Funds to the Southern Funds. Absent such a reallocation, the Greater Funds would suffer from a "structural defect". *Local 50*, 733 F.2d at 235.

There remains to be determined what portion of the reserves of the Greater Funds are to be reallocated to the Southern Funds. In view of its original disposition of this case, the district court, of course, did not reach this question, so a remand for this purpose is necessary. As a general principle, the district court should require that the Greater Funds reallocate to the Southern Funds that portion of the reserves which represents contributions on behalf of the Southern Employees for liabilities now undertaken by the Southern Funds. *See Local 50*, 733 F.2d at 238.

Local 50 dealt only with a health benefits fund. We are faced here with a more complex situation involving both welfare and pension funds, as well as both vested and unvested interests in the pension fund. To determine the

amounts to be reallocated, further proceedings are necessary in the district court, which has broad discretion in the matter. It may be that the parties will be able to agree as to the proper amounts of reserves to be transferred. All of the funds should recognize that they exist solely for the benefit of the employees. Guided by whatever agreements and evidence the parties present, the district court shall exercise its discretion to shape an appropriate remedy guided by the principle that a fair portion of the reserves reflecting contributions made to the Greater Funds on behalf of the Southern Employees should be reallocated to the Southern Funds where the Southern Funds have undertaken the responsibility to pay the benefits for which the contributions were made.

CONCLUSION

Because we decide the case based on § 302(c)(5) of the LMRA, there is no need to consider the second and third claims raised by the appellants. The judgment of the district court is reversed, and the case is remanded with instructions to enter an appropriate partial summary judgment for the plaintiffs and for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 85 Civ. 6133 (JES)

NICHOLAS DEMISAY, *et al.*,
Plaintiffs,

v.

LOCAL 144, NURSING HOME PENSION FUND, *et al.*,
Defendants.

March 15, 1989

OPINION AND ORDER

SPRIZZO, District Judge:

Plaintiffs bring this action to compel the Local 144 Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund [1] to transfer a share of their reserve funds to the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds.[2] Plaintiffs include the management trustees of the Southern Funds ("Southern management trustees"), the employers and management companies that are members of the Southern New York Residential Health Care Facilities Association, Inc. ("Southern employers" and "Southern management companies"),

[1] These funds will be referred to as the "Greater Pension Fund" and the "Greater Welfare Fund" or, collectively, the "Greater Funds."

[2] These funds will be referred to as the "Southern Pension Fund" and the "Southern Welfare Fund" or, collectively, the "Southern Funds."

and individual employees of the Southern employers and management companies ("Southern employees"). Defendants are the Greater Funds and the individual trustees of the Greater Funds. Plaintiffs have moved for partial summary judgment on the main claim. Defendants have moved to dismiss for lack of jurisdiction and standing and have cross-moved for summary judgment on the main claim.[3]

BACKGROUND

The following facts, except as noted, are undisputed.

Until 1981, the Southern Employers were members of the Greater New York Health Care Facilities Association, Inc. ("Greater New York"), a multiemployer bargaining association. *See* Affidavit of Jonathan L. Sulds ("Sulds Aff.") at ¶ 3. As a consequence of this membership, they were parties to collective bargaining agreements between Greater New York and Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144"). *See id.* Under these agreements, Southern employers were obligated to contribute to the Greater Funds on behalf of their employees. *See id.*

The Southern employers withdrew from Greater New York in 1981. Thereafter, they negotiated and executed individual collective bargaining agreements with Local 144 pursuant to which they were obligated to continue contributing to the Greater Funds on behalf of their employees. *See id.* at ¶ 4.

In 1984, B.N.H. Management Associates, Inc. ("BNH") and the other Southern Employers sought to establish their own employee pension and welfare funds

[3] In addition, defendants moved for summary judgment on their counterclaims, and Local 144 Health Facilities Training and Upgrading Fund moved for intervention pursuant to Fed.R.Civ.P. 24(b)(2). By Order dated March 1, 1988, the Court denied those motions.

and entered into negotiations with Local 144 for new individual collective bargaining agreements which would accomplish that purpose. *See id.* at ¶ 5. Pursuant to collective bargaining agreements executed on November 30, 1984, the parties agreed to the establishment of the Southern Funds. *See id.* at ¶ 7.

The parties dispute what was said during the negotiations leading to these agreements as to whether a share of the Greater Fund reserves would be transferred to the Southern Funds. *See id.* at ¶ 6-9; Affidavit of Peter Ottley ("Ottley Aff.") at ¶ 2-8. However, the collective bargaining agreement does not contain any provision relating to such transfer, although the agreement did provide that members of or contributors to the Southern Funds could bring suit to compel a transfer and that Local 144 would "not oppose such litigation to the extent it is consistent with applicable law." *See, e.g.*, Sulds Aff., Ex. A at 26.

During these negotiations, Local 144 sought assurances that its members would receive the same level of benefits in the Southern Funds as provided by the Greater Funds. *See* Sulds Aff. at ¶ 8; Ottley Aff. at ¶ 9. Therefore, the agreements provided for a continuity of benefits for covered employees so that "[n]o employee shall lose benefits as a result of transfer of his/her coverage" from the Greater Funds to the Southern Funds. *See, e.g.*, Sulds Aff., Ex. A at 16. In addition, under the terms of the agreements, Local 144 agreed to employers making payments to the Southern Funds only on the condition that those Funds provide the same level of benefits as had been provided under the Greater Funds. *See id.*, Ex. A at 16-17.

The collective bargaining agreements further provided for contributions to the new funds. Each signatory employer was to contribute to the Greater Welfare Fund until the date two months prior to the operational date of the Southern Funds. *See* Sulds Aff. at ¶ 10; Ex. A at

20-21. In addition, pension contributions after July 1, 1984 were to be made to an escrow account. *See id.*, Ex. A at 20-21.

Trust agreements establishing the Southern Funds were executed on October 18, 1985, and the board of trustees agreed that the Southern Funds would become operational on December 1, 1985. *See id.* at ¶¶ 11-12 & Exs. B. C, D. Subsequently, the board of trustees of the Southern Pension Fund agreed that the Southern Fund would fully recognize all years of credited service earned under the Greater Pension Fund by any participants who had not vested under that plan.[4] *See id.* at ¶ 13 & Ex. E at 2. Furthermore, for employees vested under the Greater Pension Fund, the Southern Pension Fund would provide a pro rata portion of their ultimate pension benefit.[5] *See id.* at ¶ 14 & Ex. E at 2.

DISCUSSION

Plaintiffs in this action make three claims. First, they allege that the failure of the Greater Funds' trust documents to provide for the transfer of a portion of their reserves to the Southern Funds is a structural defect in the plans violative of section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5) (1982). Next, they allege that the Greater Funds violate section 4234 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1414 (1982), because they do not have asset transfer

[4] For example, an employee with nine years credited service under the Greater Pension Fund who retired after participating in the Southern Pension Fund for one year would be vested under the Southern Pension Fund's ten year service requirement and would receive benefits based on ten years of service. *See* Sulds Aff. at ¶ 13 & Ex. E at 2.

[5] For example, an employee retiring with twenty five years of combined service, with eight years under the Southern Pension Fund, would receive eight/twenty-fifths of his total benefit from the Southern Pension Fund. *See* Sulds Aff. at ¶ 14 & Ex. E at 2.

rules. Finally, plaintiff employees allege that defendant trustees have breached their fiduciary obligations under section 404 of ERISA, 29 U.S.C. § 1104 (1982). The Court will address each of these claims in turn.

I. *LMRA section 302(c)(5)*

A. Jurisdiction

Plaintiffs in their first claim assert a violation of LMRA section 302(c)(5), 29 U.S.C. § 186(c)(5), which provides that employer payments may be made to an employee trust fund established for "the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)." The federal courts clearly have jurisdiction under section 302(e), 29 U.S.C. § 186(e) (1982), to enforce a trust fund's compliance with this section. *See Local 50, Bakery & Confectionery Workers Union v. Local 3 Bakery & Confectionery Workers Union*, 733 F.2d 229, 234 (2d Cir.1984).

Defendants' argument that there is no jurisdiction here because the Court cannot examine the reasonableness of collectively bargained provisions, *see United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), is untenable on the facts of this case. Plaintiffs do not challenge the reasonableness of any collectively bargained term, but rather allege that the Greater Funds do not comply with the specific standards of section 302(c)(5). *See Robinson*, 455 U.S. at 573 n. 12, 102 S.Ct. at 1233 n. 12; *see also infra* note 13. The Court clearly has jurisdiction to review a challenge that the Greater Funds are structurally deficient under that section's "sole and exclusive benefit" standard. *See Local 50, supra*, 733 F.2d at 234; *Alvares v. Erickson*, 514 F.2d 156, 165 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106

(1975); *Teamsters Local No. 145 v. Kuba,* 631 F.Supp. 1063, 1068-69 (D.Conn.1986).

B. Standing

Defendants also challenge the standing of plaintiffs to assert their section 302(c)(5) claim. Defendants contend that because the purpose of section 302(c)(5) is to protect the interests of employees, only "employees in the fund" are proper parties to assert this claim. However, although section 302 does not specifically delineate who may sue or be sued, it has been held that employees, unions, trustees and employers all have standing to sue under section 302(c)(5). *See Molnar v. Wibbelt,* 789 F.2d 244, 248-49 (3d Cir.1986) (quoting *Copra v. Suro,* 236 F.2d 107, 114 (1st Cir. 1956)).

Moreover, standing under section 302(c)(5) does not require a nexus to the fund as close as that which may be required under ERISA.[6] *See Molnar, supra,* 789 F.2d at 249. Here, the Southern employers and management companies allege that unless there is a transfer of reserves to the new funds, the employers will be required either to reduce benefits or make more payments into the funds.[7] The Court concludes that this alleged injury is sufficient to establish standing. *Cf. Central Tool Co. v. Int'l Assoc. of Machinists Nat'l Pension Fund, Benefit Plan A,* 811 F.2d 651, 655-56 (D.C.Cir.1987).

The standing of Southern employees is less clear, because the employers have agreed that benefit levels will

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[6] Although standing was not raised as an issue in *Local 50,* the court there allowed a successor trust fund to maintain an action to compel compliance by a predecessor fund with Section 302(c)(5). *See Local 50, supra,* 733 F.2d at 234; *see also Alvares, supra,* 514 F.2d at 165.

[7] In fact, at Oral Argument, counsel for plaintiffs stated that because the Greater Funds have not transferred assets, there has already been a restructuring of the Southern Funds benefit plan and one form of benefit was dropped after collective bargaining. *See* Transcript at 17, 36.

remain the same.[8] However, assuming that the Southern employers are unable to properly fund the Southern Funds in the event that a transfer of reserves is not ordered, the possibility and perhaps the likelihood that their benefit levels might be adversely affected if the employers are financially unable to honor their commitment to the unions sufficient to confer standing to challenge the refusal of the Greater Funds to make that transfer. Moreover, as former employees in a welfare fund who seek to challenge a structural defect in that fund, they also have standing on that basis as well. *See Alvares*, *supra*, 514 F.2d at 164-65.

The management trustees of the Southern Funds have also sued, but the union trustees have not, and therefore the Southern Funds themselves are not parties to this action. The Southern Fund trust documents provide that trustee decisions shall be made by the concurring vote of a majority of union trustees, acting as one group, and management trustees, acting as one group, and that if trustees are unable to agree on an action, it shall be submitted to arbitration. *See* Sulds Aff. Ex. B at 24, 27 & Ex. C at 24, 27. The management trustees, therefore, cannot sue here without first employing the arbitration procedures in the trust documents. *See Alfarone v. Bernie Wolff Const. Corp.*, 788 F.2d 76, 79 (2d Cir.), *cert. denied*, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 289 (1986). Thus, any claim by the management trustees based upon their fiduciary duty to ensure that the Southern Funds contain all reserves to which they are entitled is premature.

C. The Merits

Plaintiff's argument here is that the Greater Welfare and Pension Funds are compelled to transfer a share of their reserves to the Southern Welfare and Pension

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[8] Defendants challenge the standing of Southern employees only as it relates to the Greater Welfare Fund.

Funds, not because of any agreement to do so, but because the law requires it. Relying on *Local 50*, the gist of their argument is that section 302(c)(5) makes it unlawful for funds contributed by one employer to be used for the benefit of persons other than its employees once the employer leaves the fund.

Although there is language in *Local 50* that would tend to support this position, that case presented a much different factual setting. In *Local 50*, where the Second Circuit found a structural defect in a union welfare plan, employees of Entenmanns had voted to change their bargaining representative from Local 50 to Local 3. As a result, Entenmanns' began contributing to the Local 3 welfare fund, and the Local 3 trustees assumed the duties then held by the Local 50 fund trustees. *See id.* at 231. It was in that context that Local 3 sought to have the portion of Local 50 welfare fund reserves representing Entenmanns past contributions transferred to the Local 3 fund. *See id.* at 232.

In reaching its conclusion that a transfer of reserves was required, the Court was influenced by the following equitable considerations. First, the case involved the rights of employees, not employers, to reap the benefits of employer contributions made in lieu of wages. *See id.* at 233. More importantly, however, that case involved a choice by employees to change their bargaining representative, a right "that strikes at the very core of collective representation." *Id.* The Court found that the absence of a provision for the transfer of an aliquot share of the reserves to the new fund could seriously interfere with the employees' right to choose their bargaining representative, a right protected by federal law, because absent such a transfer, an employee could only change unions at the cost of forfeiting payments previously made on his behalf by his employer. *See id.* at 234.

The absence of those considerations requires a different result here. First, any transfer here would be for the

primary benefit of the employers, not the employees.[9] It is undisputed that it was the employers who sought to create a new fund and that the employees, through their union, only agreed because the employers guaranteed to keep benefits at the same levels as under the former plans. Nowhere in section 302 or in ERISA, or the legislative history or case authorities construing either, is there any indication of a congressional intent to benefit employers. Thus, it would be in derogation of congressional intent to require a transfer when the effect of such transfer is to permit the *employers* to fund their promise to the union with assets from the old plan.

Moreover, this case does not present a situation where absent a transfer there would be a substantial interference with the free choice of a collective bargaining representative. *Cf. id.* at 233. Indeed, not only *Local 50*, but all of the other cases relied upon by plaintiffs involved either a change in collective bargaining representative or an *employee* decision to change plans. *See Local 50*, *supra*, 733 F.2d at 231; *Alvares*, *supra*, 514 F.2d at 159; *Trapani v. Consolidated Edison Employees*, 651 F.Supp. 400, 401-02 (S.D.N.Y. 1987). In this case it is the employers who have chosen to create a new fund, even though their employees have remained in the same union, Local 144.

Although the employers claim that if assets are not transferred they will be forced to pay more into the fund or they will have to reduce benefits, that circumstance is the consequence of the obligation *they* assumed because *they* chose to create a new plan. It would indeed be anomalous to permit an employer to willingly assume obligations for its own purposes and then to use the financial pressures of that choice to force a transfer of assets from the plan from which it has chosen to withdraw. This

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[9] Indeed, the only possible benefit to the employees would be to protect the employees against the circumstance that the employers might not be financially able to honor their commitment pursuant to the collective bargaining agreement.

Court therefore will not construe *Local 50* so as to compel that result.[10]

This is especially true since the union, which represented the employees, did not insist on a transfer of fund reserves as a condition to its agreement to permit the employers to set up the Southern Funds, but was satisfied with a commitment that benefit levels would not be reduced.[11] Thus, no rights of collective bargaining can be implicated where, as here, the union did collectively bargain and did not condition agreement to the Southern Funds on a transfer of assets.[12]

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[10] Defendants here also argue that a transfer of assets would violate the Greater Funds trust agreements as well as section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1) (1982), because no employer has any right to assets of the plan except to provide benefits to plan beneficiaries and Southern employees are no longer beneficiaries of the Greater Funds. The Court cannot accept that argument. In fact, *Local 50* involved a situation in which assets of a fund were transferred to a new fund to benefit persons who were no longer beneficiaries of the old fund. *See Local 50, supra,* 733 F.2d at 234.

The argument that a transfer of assets violates ERISA because it would benefit the employers has more persuasive force although the Court need not decide that issue because it concludes for other reasons that the assets need not be transferred. In any event, any transferred assets would be held in trust and arguably would not directly benefit the employers. *See Holliday v. Xerox Corp.,* 732 F.2d 548, 550-51 (6th Cir.), *cert. denied,* 469 U.S. 917, 105 S.Ct. 294, 83 L.Ed.2d 229 (1984).

[11] The union did agree that it would not object to the bringing of this action to the extent it would be consistent with applicable law, but that does not support an inference that the union agreed with the legal position of the Southern employers that a transfer of assets was mandated by law.

[12] It is also significant that the result plaintiffs seek here could place an employer who wishes to break away from a multiemployer plan in an enhanced bargaining position because it would be assured of being able to take its share of contributions from a predecessor fund. It would appear, therefore, that construing the statute so as to require a transfer could tend to subvert the collective bargaining position of the union, and that, if anything, the equitable consideration relied on in *Local 50* dictate the opposite result here.

Furthermore, section 302(c)(5) is an exception to a criminal statute designed primarily to address the problem of corruption in labor unions. *See Arroyo v. United States*, 359 U.S. 419, 425-26, 79 S.Ct. 864, 868-69, 3 L.Ed.2d 915 (1959). Although that provision clearly furthers "other beneficial policies such as an employee's freedom to choose the collective bargaining representative he wants," *see Local 50, supra*, 733 F.2d at 236, in this case the transfer which is sought does not further policies related to the choice of collective bargaining representative, and there has been no allegation of corruption. There is thus no reason to find a structural defect in the Greater Welfare and Pension Plans on the facts of this case.[13]

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[13] Defendants argue that the result sought by plaintiffs is foreclosed by *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), and that the *Local 50* Court misconstrued both *Robinson* and section 302(c)(5). The Court does not find these arguments persuasive.

In *Robinson*, the Court held only that a federal court could not test the reasonableness of a collectively bargained term under section 302(c)(5), so "long as such conditions do not violate federal law or policy." *See id.* at 574-75, 102 S.Ct. at 1233-34. Here, although the Greater Fund trust documents provide that no one may have rights to the funds except as specified in the plans and the plans have no provision regarding the transfer of assets, plaintiffs do not challenge the reasonableness of any provision, but instead argue the plans are violative of section 302(c)(5). *Robinson*, therefore, does not apply. *See Local 50, supra*, 733 F.2d at 236; *see also Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir.1985). In addition, defendants argue that in *Local 50* the Court incorrectly found that in *Robinson*, "the money retained by the trust fund redounded to the 'sole and exclusive benefit' of each contributing employer's employees." *See Local 50, supra*, 733 F.2d at 236. Defendants contend that the funds at issue in *Robinson* were pooled multiemployer funds which did not segregate out contributing employers' funds. However, in *Robinson* the money did inure to the "sole and exclusive benefit" of all contributing employers' employees because no one had left the fund. Moreover, the issue in *Robinson* was not whether the plan was unlawful for that reason but rather whether it was reasonable to distribute fund benefits among fund participants in the manner provided for in the plan. *See Robinson, supra*, 455 U.S. at 568, 102 S.Ct. at 1230.

The Court also rejects plaintiffs' argument that the Southern Funds, which are not parties here, have assumed the liabilities of the Greater Funds and that therefore the assets attributable to those liabilities must follow those liabilities. The Greater Funds never had any liability to accrue pension credit or provide welfare coverage for persons who had left the fund, and the Greater Pension Fund continues to provide pension benefits to those employees who have vested under the Greater Pension Plan.[14] While it is true that the Greater Welfare Plan no longer provides welfare coverage and the Greater Pension Plan no longer accrues service credits for the Southern employees, plaintiffs have not claimed and cannot claim that either of the Greater Funds ever had any obligation to provide benefits or accrue credit for persons who were no longer in the plan.

It is true that the Southern Pension Fund does recognize past years of service for those employees who had not vested under the Greater Pension Fund, but that was a decision made by the Southern Fund trustees after establishment of those funds. Moreover, an assumption of liability for welfare benefits and past service credit by the Southern Funds is not the same as a transfer of liabilities from the Greater Funds to them, since the latter implies that the Greater Funds had a preexisting obligation to those who left the plan, which is simply not the case here. The Court concludes therefore that there has been no transfer of liabilities from the Greater Funds to the Southern Funds.[15]

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[14] In fact, plaintiffs state that this is a liability that they will assume once the assets of the Greater Funds are transferred to them. *See* Plaintiff's Reply Memorandum of Law at 20 n. *.

[15] In addition, under the definition of a transfer of liabilities under ERISA, there has not been a "diminution of . . . liabilities with respect to [the Greater Funds] and . . . the assumption of these liabilities by [the Southern Funds] . . ." *See* 29 C.F.R. § 2670.3 (1987).

It is also significant to note that plaintiffs' claim for a transfer of assets from the Greater Pension Fund is clearly foreclosed by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* (1982). In these amendments, after a careful examination of issues relating to the funding of pension plans, Congress enacted a comprehensive statute regulating employer withdrawal from pension plans.[16] However, only one provision of these amendments, section 4235 of ERISA, mandates the transfer of assets and liabilities, and that is when "an employer has completely or partially withdrawn from a multiemployer plan . . . as a result of a certified change of collective bargaining representative." *See* 29 U.S.C. § 1415 (Supp. IV 1986). Although there are several provisions dealing with the merger or transfer of plan assets or liabilities under MPPAA, in no other situation is a transfer of assets and liabilities mandated. *See* 29 U.S.C. §§ 1411-15.

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[16] The Court does not accept the argument that MPPAA applies to all multiemployer plans, not just pension plans. In *Trustees v. Lith-O-Kraft Plate Co.*, 692 F.Supp. 782 (N.D.Ohio 1988), the Court held that Congress did not intend to impose withdrawal liability under MPPAA on employers withdrawing from a welfare fund. *See id.* at 787-88. The Court finds the reasoning of that case persuasive. Although the language of the statute does refer to "multiemployer plans", the Court has been unable to find, nor has plaintiff cited, a case applying the MPPAA amendments to any plans other than pensions plans.

Similarly, in *T.I.M.E.—D.C., Inc. v. Management-Labor Welfare & Pension Funds, of Local 1730*, 756 F.2d 939 (2d Cir.1985), the Court stated that "[t]he goal of the withdrawal and transfer provisions of the MPPAA is to ensure that the employer covers its pension obligations in both the old and the new plans." *See id.* at 945-46; *see also New York State Teamsters Conference Pension & Retirement Fund v. McNicholas Transp. Co.*, 848 F.2d 20, 22 (2d Cir.1988). Moreover, the title of the Act and the legislative history of the amendments indicate that Congress sought to regulate multiemployer *pension* plans, not all multiemployer plans. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1 at 51, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2919.

Congress, therefore, has specifically determined that the only situation in which a pension plan must transfer assets and liabilities is when there has been a certified change in collective bargaining representative.[17] Because Congress has specifically legislated in this area and has decided when a transfer of assets and liabilities is mandated, the Court should not and cannot expansively interpret LMRA section 302(c)(5) so as to accomplish that result. *Cf. Teamsters v. Daniels*, 439 U.S. 551, 569-70, 99 S.Ct. 790, 801-02, 58 L.Ed.2d 808 (1979). Indeed, as the Court of Appeals has noted, most of the problems created by employer withdrawal from multiemployer pension plans have been resolved by MPPAA. *See O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 173 n. 8 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212, 105 S.Ct. 1181, 84 L.Ed.2d 329 (1985).

Therefore, for the reasons stated above, the Court concludes that the Greater Welfare Funds and the Greater Pension Funds are not structurally deficient under section 302(c)(5) and that plaintiffs' first claim must be dismissed.

II. *ERISA*

A. Asset Transfer Rules

Plaintiffs also claim that the Greater Funds are deficient for failing to adopt asset transfer rules pursuant to section 4234 of ERISA, 29 U.S.C. § 1414, and seek an order requiring the Greater Funds to adopt asset transfer rules.[18] It is undisputed here that the Greater Pension

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[17] This congressional choice affords further support for the Court's view that *Local 50* should not be read as requiring a transfer for any purpose other than protecting the freedom of employees in selecting their collective bargaining representative.

[18] 29 U.S.C. § 1414(a) provides in pertinent part:

A transfer of assets from a multiemployer plan to another plan shall comply with asset-transfer rules which shall be adopted by the multiemployer plan and which

Fund does not have asset transfer rules.[19] *See* Plaintiffs' First Request for Admission of Facts at ¶¶ 6-7. However, even assuming arguendo that the Greater Pension Fund is deficient in failing to have asset transfer rules, under MPPAA plaintiffs must be "adversely affected" by that omission. *See* Section 4301(a)(1) of ERISA, 29 U.S.C. § 1451(a)(1) (1982). Plaintiffs cannot meet that burden unless they can establish that a transfer pursuant to those asset transfer rules would inure to their benefit.[20] This they have failed to do. It follows that they lack standing to assert that claim.

Moreover, section 1414 does not address any situation except that in which a plan is transferring assets "in connection with the transfer of plan liabilities." Therefore, this section would be relevant to this case only if there had been a transfer of liabilities. Because the Court has concluded that there has been no transfer of liabilities from the Greater Funds to the Southern Funds, this section is inapplicable.

In addition, section 1414 applies only to a situation in which there is a transfer of assets in connection with a voluntary transfer of liabilities, not a transfer by operation of law. *See Vornado, Inc. v. Trustees of the Retail Store Employees' Union Local 1262*, 829 F.2d 416, 420-21 (3d Cir. 1987). As stated *supra*, Congress clearly pro-

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(1) do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities, and

(2) operate and are applied, uniformly with respect to each proposed transfer, except that the rules may provide for reasonable variations taking into account the potential financial impact of a proposed transfer on the multiemployer plan.

[19] As stated *supra* at note 16, the Court does not accept the argument that the MPPAA amendments were intended to apply to all multiemployer plans rather than only pension plans.

[20] Plaintiffs have not argued that section 1414 itself would require the transfer. Instead, they argue that *Local 50* requires the transfer and that rules adopted pursuant to section 1414 would effectuate the transfer. *See* Plaintiffs' Reply Memorandum of Law at 25.

vided in 29 U.S.C. § 1415 for a situation in which a transfer of assets and liabilities would be mandated and there is no indication in the statute or its legislative history demonstrating that Congress intended to require a transfer of assets in any other situation unless there was a voluntary transfer of liabilities, which is clearly not the case here. *See* Views and Analysis of Senate Labor Committee on S. 1076, Benefits and Pension Reporter No. 288 (Apr. 28, 1980).

Moreover, MPPAA emphasized the interests of plan beneficiaries and the Pension Benefit Guaranty Corporation and was not designed to increase the power of contributing employers. *See Vornado, supra,* 829 F.2d at 420. Here, the result sought by plaintiffs would increase the power of contributing employers by forcing a transfer of assets to a new fund they wished to create.

B. Breach of Fiduciary Duty

Plaintiff employees also allege that defendants have violated their fiduciary duty under section 404 of ERISA, 29 U.S.C. § 1104, for failing to administer the trust documents in accordance with ERISA by failing to adopt asset transfer rules and for treating the Southern employees differently from those employees still in the Greater Funds by failing to transfer an aliquot share of assets. The Court has already determined that the Greater Funds are not structurally deficient under section 302(c)(5) and that any failure of the Greater Pension Fund to have asset transfer rules would not aggrieve these plaintiffs. It follows that the trustees have not violated any fiduciary duty owed to plaintiffs in refusing to transfer assets pursuant to section 302(c)(5). Therefore, plaintiffs' claim for a breach of fiduciary duty must be dismissed.

CONCLUSION

For the reasons set forth above, plaintiffs' motion for partial summary judgment on the main claim is denied; defendants' motion for summary judgment on the section 302 claim is granted; defendants' motion to dismiss the section 1414 claim for lack of standing is granted; and defendants' motion for summary judgment on the section 404 claim is granted.

It is SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of June, one thousand nine hundred and ninety-one.

Present: HON. AMALYA L, KEARSE
HON. GEORGE C. PRATT
HON. JOSEPH M. MCLAUGHLIN
Circuit Judges,

90-7894

NICHOLAS DEMISAY, *et al.*,
Plaintiffs-Appellants,

-v-

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York

MANDATE

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from a judgment of said district court is reversed and the action be and it hereby is remanded to the district court for further proceedings consistent with the opinion of this court.

Elaine B. Goldsmith
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

Issued as Mandate July 3, 1991

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED, 29 U.S.C. §§ 1001-1461

Section 403(c)(1)-(2), 29 U.S.C. § 1103(c)(1)-(2)

Establishment of trust

* * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 as in effect on January 1, 1991) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

(i) if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribu-

tion or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

*   *   *   *

Section 404(a)(1), 29 U.S.C. § 1104(a)(1)

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Section 406(a)(1), 29 U.S.C. § 1106(a)(1)

Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

Section 408(b)(11), 29 U.S.C. § 1108(b)(11)

Exemptions from prohibited transactions

* * * *

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

* * * *

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

Section 4201(a), 29 U.S.C. § 1381(a)

Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Section 4231, 29 U.S.C. § 1411

Mergers and transfers between multiemployer plans

(a) Authority of plan sponsor

Unless otherwise provided in regulations prescribed by the corporation, a plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans, or engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such merger or transfer satisfies the requirements of subsection (b) of this section.

(b) Criteria

A merger or transfer satisfies the requirements of this section if—

(1) in accordance with regulations of the corporation, the plan sponsor of a multiemployer plan notifies the corporation of a merger with or transfer of plan assets or liabilities to another multiemployer plan at least 120 days before the effective date of the merger or transfer;

(2) no participant's or beneficiary's accrued benefit will be lower immediately after the ef-

fective date of the merger or transfer than the benefit immediately before that date;

(3) the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 1426 of this title; and

(4) an actuarial valuation of the assets and liabilities of each of the affected plans has been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as of the day before the start of that plan year, or other valuation of such assets and liabilities performed under such standards and procedures as the corporation may prescribe by regulation.

(c) Actions not deemed violation of section 1106(a) or (b)(2) of this title

The merger of multiemployer plans or the transfer of assets or liabilities between multiemployer plans, shall be deemed not to constitute a violation of the provisions of section 1106(a) of this title or section 1106(b)(2) of this title if the corporation determines that the merger or transfer otherwise satisfies the requirements of this section.

(d) Nature of plan to which liabilities are transferred

A plan to which liabilities are transferred under this section is a successor plan for purposes of section 1322a(b)(2)(B) of this title.

Section 4232, 29 U.S.C. § 1412

Transfers between multiemployer plan and single-employer plan

(a) General authority

A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

(b) Accrued benefit of participant or beneficiary not lower immediately after effective date of transfer or merger

No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) of this section than the benefit immediately before that date.

(c) Liability of multiemployer plan to corporation where single-employer plan terminates within 60 months after effective date of transfer; amount of liability, exemption, etc.

(1) Except as provided in paragraphs (2) and (3), a multiemployer plan which transfers liabilities to a single-employer plan shall be liable to the corporation if the single-employer plan terminates within 60 months after the effective date of the transfer. The amount of liability shall be the lesser of—

(A) the amount of the plan asset insufficiency of the terminated single-employer plan, less 30 percent of the net worth of the employer who maintained the single-employer plan, determined in accordance with section 1362 or 1364 of this title, or

(B) the value, on the effective date of the transfer, of the unfunded benefits transferred to the single-employer plan which are guaranteed under section 1322 of this title.

(2) A multiemployer plan shall be liable to the corporation as provided in paragraph (1) unless, within 180 days after the corporation receives an application (together with such information as the corporation may reasonably require for purposes of such application) from the multiemployer plan sponsor for a determination under this paragraph—

(A) the corporation determines that the interests of the plan participants and beneficiaries and of the corporation are adequately protected, or

(B) fails to make any determination regarding the adequacy with which such interests are protected with respect to such transfer of liabilities.

If, after the receipt of such application, the corporation requests from the plan sponsor additional information necessary for the determination, the running of the 180-day period shall be suspended from the date of such request until the receipt by the corporation of the additional information requested. The corporation may by regulation prescribe procedures and standards for the issuance of determinations under this paragraph. This paragraph shall not apply to any application submitted less than 180 days after September 26, 1980.

(3) A multiemployer plan shall not be liable to the corporation as provided in paragraph (1) in the case of a transfer from the multiemployer plan to a single-employer plan of liabilities which accrued under a single-employer plan which merged with the multiemployer plan, if, the value of liabilities transferred to the single-employer plan does not exceed the value of the liabilities for benefits which accrued before the merger, and the value of the assets transferred to the single-employer plan is substantially equal to the

value of the assets which would have been in the single-employer plan if the employer had maintained and funded it as a separate plan under which no benefits accrued after the date of the merger.

(4) The corporation may make equitable arrangements with multiemployer plans which are liable under this subsection for satisfaction of their liability.

(d) Guarantee of benefits under single-employer plan

Benefits under a single-employer plan to which liabilities are transferred in accordance with this section are guaranteed under section 1322 of this title to the extent provided in that section as of the effective date of the transfer and the plan is a successor plan.

(e) Transfer of liabilities by multiemployer plan to single-employer plan

(1) Except as provided in paragraph (2), a multiemployer plan may not transfer liabilities to a single-employer plan unless the plan sponsor of the plan to which the liabilities would be transferred agrees to the transfer.

(2) In the case of a transfer described in subsection (c)(3) of this section, paragraph (1) of this subsection is satisfied by the advance agreement to the transfer by the employer who will be obligated to contribute to the single-employer plan.

(f) Additional requirements by corporation for protection of interest of plan participants, beneficiaries and corporation; approval by corporation of transfer of assets or liabilities to single-employer plan from plan in reorganization; covered transfers in connection with termination

(1) The corporation may prescribe by regulation such additional requirements with respect to the transfer of assets or liabilities as may be necessary to protect the interests of plan participants and beneficiaries and the corporation.

(2) Except as otherwise determined by the corporation, a transfer of assets or liabilities to a single-employer plan from a plan in reorganization under section 1421 of this title is not effective unless the corporation approves such transfer.

(3) No transfer to which this section applies, in connection with a termination described in section 1341a(a)(2) of this title shall be effective unless the transfer meets such requirements as may be established by the corporation to prevent an increase in the risk of loss to the corporation.

Section 4233, 29 U.S.C. § 1413

Partition

(a) Authority of corporation

The corporation may order the partition of a multiemployer plan in accordance with this section.

(b) Authority of plan sponsor upon application to corporation for partition order; procedures applicable to corporation

A plan sponsor may apply to the corporation for an order partitioning a plan. The corporation may not order the partition of a plan except upon notice to the plan sponsor and the participants and beneficiaries whose vested benefits will be affected by the partition of the plan, and upon finding that—

(1) a substantial reduction in the amount of aggregate contributions under the plan has re-

sulted or will result from a case or proceeding under Title 11 with respect to an employer;

(2) the plan is likely to become insolvent;

(3) contributions will have to be increased significantly in reorganization to meet the minimum contribution requirement and prevent insolvency; and

(4) partition would significantly reduce the likelihood that the plan will become insolvent.

(c) Authority of corporation withstanding pendency of partition proceeding

The corporation may order the partition of a plan notwithstanding the pendency of a proceeding described in subsection (b)(1) of this section.

(d) Scope of partition order

The corporation's partition order shall provide for a transfer of no more than the nonforfeitable benefits directly attributable to service with the employer referred to in subsection (b)(1) of this section and an equitable share of assets.

(e) Nature of plan created by partition

The plan created by the partition is—

(1) a successor plan to which section 1322a of this title applies, and

(2) a terminated multiemployer plan to which section 1341a(d) of this title applies, with respect to which only the employer described in subsection (b)(1) of this section has withdrawal liability, and to which section 1368 of this title applies.

(f) Authority of corporation to obtain decree partitioning plan and appointing trustee for terminated portion of partitioned plan

The corporation may proceed under section 1342 (c) through (h) of this title for a decree partitioning a plan and appointing a trustee for the terminated portion of a partitioned plan. The court may order the partition of a plan upon making the findings described in subsection (b) (1) through (4) of this section, and subject to the conditions set forth in subsections (c) through (e) of this section.

Section 4234, 29 U.S.C. § 1414

Asset transfer rules

(a) Applicability and scope

A transfer of assets from a multiemployer plan to another plan shall comply with asset-transfer rules which shall be adopted by the multiemployer plan and which—

(1) do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities, and

(2) operate and are applied uniformly with respect to each proposed transfer, except that the rules may provide for reasonable variations taking into account the potential financial impact of a proposed transfer on the multiemployer plan.

Plan rules authorizing asset transfers consistent with the requirements of section 1412(c) (3) of this title shall be considered to satisfy the requirements of this subsection.

(b) Exemption of de minimis transfers

The corporation shall prescribe regulations which exempt de minimis transfers of assets from the requirements of this part.

(c) Written reciprocity agreements

This part shall not apply to transfers of assets pursuant to written reciprocity agreements, except to the extent provided in regulations prescribed by the corporation.

Section 4235, 29 U.S.C. § 1415

Transfers pursuant to change in bargaining representative

(a) Authority to transfer from old plan to new plan pursuant to employee participation in another multiemployer plan after certified change of representative

In any case in which an employer has completely or partially withdrawn from a multiemployer plan (hereafter in this section referred to as the "old plan") as a result of a certified change of collective bargaining representative occurring after September 25, 1980, if participants of the old plan who are employed by the employer will, as a result of that change, participate in another multiemployer plan (hereafter in this section referred to as the "new plan"), the old plan shall transfer assets and liabilities to the new plan in accordance with this section.

(b) Notification by employer of plan sponsor of old plan; notification by plan sponsor of old plan of employer and plan sponsor of new plan; appeal by new plan to prevent transfer; further proceedings

(1) The employer shall notify the plan sponsor of the old plan of a change in multiemployer plan participation described in subsection (a) of this section no later than 30 days after the employer determines that the change will occur.

(2) The plan sponsor of the old plan shall—

(A) notify the employer of—

(i) the amount of the employer's withdrawal liability determined under part 1 of this subtitle with respect to the withdrawal,

(ii) the old plan's intent to transfer to the new plan the nonforfeitable benefits of the employees who are no longer working in covered service under the old plan as a result of the change of bargaining representative, and

(iii) the amount of assets and liabilities which are to be transferred to the new plan, and

(B) notify the plan sponsor of the new plan of the benefits, assets, and liabilities which will be transferred to the new plan.

(3) Within 60 days after receipt of the notice described in paragraph (2)(B), the new plan may file an appeal with the corporation to prevent the transfer. The transfer shall not be made if the corporation determines that the new plan would suffer substantial financial harm as a result of the transfer. Upon notification described in paragraph (2), if—

(A) the employer fails to object to the transfer within 60 days after receipt of the notice described in paragraph (2)(A), or

(B) the new plan either—

(i) fails to file such an appeal, or

(ii) the corporation, pursuant to such an appeal, fails to find that the new plan would suffer substantial financial harm as a result of the transfer described in the notice under

paragraph (2)(B) within 180 days after the date on which the appeal is filed,

then the plan sponsor of the old plan shall transfer the appropriate amount of assets and liabilities to the new plan.

(c) Reduction of amount of withdrawal liability of employer upon transfer of appropriate amount of assets and liabilities by plan sponsor of old plan to new plan

If the plan sponsor of the old plan transfers the appropriate amount of assets and liabilities under this section to the new plan, then the amount of the employer's withdrawal liability (as determined under section 1381(b) of this title without regard to such transfer and this section) with respect to the old plan shall be reduced by the amount by which—

(1) the value of the unfunded vested benefits allocable to the employer which were transferred by the plan sponsor of the old plan to the new plan, exceeds

(2) the value of the assets transferred.

(d) Escrow payments by employer upon complete or partial withdrawal and prior to transfer

In any case in which there is a complete or partial withdrawal described in subsection (a) of this section, if—

(1) the new plan files an appeal with the corporation under subsection (b)(3) of this section, and

(2) the employer is required by section 1399 of this title to begin making payments of withdrawal liability before the earlier of—

(A) the date on which the corporation finds that the new plan would not suffer substantial financial harm as a result of the transfer, or

(B) the last day of the 180-day period beginning on the date on which the new plan files its appeal,

then the employer shall make such payments into an escrow held by a bank or similar financial institution satisfactory to the old plan. If the transfer is made, the amounts paid into the escrow shall be returned to the employer. If the transfer is not made, the amounts paid into the escrow shall be paid to the old plan and credited against the employer's withdrawal liability.

(e) Prohibition on transfer of assets to new plan by plan sponsor of old plan; exemptions

(1) Notwithstanding subsection (b) of this section, the plan sponsor shall not transfer any assets to the new plan if—

(A) the old plan is in reorganization (within the meaning of section 1421(a) of this title), or

(B) the transfer of assets would cause the old plan to go into reorganization (within the meaning of section 1421(a) of this title).

(2) In any case in which a transfer of assets from the old plan to the new plan is prohibited by paragraph (1), the plan sponsor of the old plan shall transfer—

(A) all nonforfeitable benefits described in subsection (b)(2) of this section, if the value of such benefits does not exceed the withdrawal liability of the employer with respect to such withdrawal, or

(B) such nonforfeitable benefits having a value equal to the withdrawal liability of the employer, if the value of such benefits exceeds the withdrawal liability of the employer.

(f) Agreement between plan sponsors of old plan and new plan to transfer in compliance with other statutory provisions; reduction of withdrawal liability of employer from old plan; amount of withdrawal liability of employer to new plan

(1) Notwithstanding subsections (b) and (e) of this section, the plan sponsors of the old plan and the new plan may agree to a transfer of assets and liabilities that complies with sections 1411 and 1414 of this title, rather than this section, except that the employer's liability with respect to the withdrawal from the old plan shall be reduced under subsection (c) of this section as if assets and liabilities had been transferred in accordance with this section.

(2) If the employer withdraws from the new plan within 240 months after the effective date of a transfer of assets and liabilities described in this section, the amount of the employer's withdrawal liability to the new plan shall be the greater of—

(A) the employer's withdrawal liability determined under part 1 of this subtitle with respect to the new plan, or

(B) the amount by which the employer's withdrawal liability to the old plan was reduced under subsection (c) of this section, reduced by 5 percent for each 12-month period following the effective date of the transfer and ending before the date of the withdrawal from the new plan.

(g) Definitions

For purposes of this section—

(1) "appropriate amount of assets" means the amount by which the value of the nonforfeitable benefits to be transferred exceeds the amount of the employer's withdrawal liability to the old plan (determined under part 1 of this subtitle without regard to section 1391(e) of this title), and

(2) "certified change of collective bargaining representative" means a change of collective bargaining representative certified under the Labor-Management Relations Act, 1947 [29 U.S.C. §§ 141 et seq.], or the Railway Labor Act [45 U.S.C. §§ 151 et seq.].

LABOR-MANAGEMENT RELATIONS ACT, AS AMENDED

Section 302(a)-(e), 29 U.S.C. § 186(a)-(e)

Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own chosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting com-

merce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 10102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable

* * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents

jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefits of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds

held therein cannot be used for any purpose other than paying such pensions or annuities;

* * * *

(d) Penalty for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved

in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

INTERNAL REVENUE CODE

Sections 413(a) and (b)(3), 26 U.S.C. §§ 413(a) and (b)(3)

COLLECTIVELY BARGAINED PLANS, ETC.

(a) Application of Subsection (b).—Subsection (b) applies to—

(1) a plan maintained pursuant to an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, and

(2) each trust which is a part of such plan.

(b) General Rule.—If this subsection applies to a plan, notwithstanding any other provisions of this title—

* * * *

(3) Exclusive benefit. — For purposes of section 401(a), in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries, all plan participants shall be considered to be his employees.

TREASURY REGULATIONS

26 C.F.R. § 1.414(l)-1(b)(3) Mergers and consolidations of plans or transfers of plan assets

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(b) **Definitions**: For purposes of this section:

* * * *

(3) *Transfer of assets or liabilities.* A "transfer of assets or liabilities" occurs when there is a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan. For example, the shifting of assets or liabilities pursuant to a reciprocity agreement between two plans in which one plan assumes liabilities of another plan is a transfer of assets or liabilities. However, the shifting of assets between several funding media used for a single plan (such as between trusts, between annuity contracts, or between trusts and annuity contracts) is not a transfer of assets or liabilities.

* * * *

REGULATIONS OF THE PENSION BENEFIT GUARANTY CORPORATION

29 C.F.R. § 2670.3 Merger and transfer definitions

For purposes of Part 2672—

* * * *

"Transfer" and "transfer of assets or liabilities" mean a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan or plans (including a plan that did not exist prior to the transfer). However, the shifting of assets or liabilities pursuant to a written reciprocity agreement between two multiemployer plans in which one plan assumes liabilities of another plan is not a transfer of assets or liabilities. In addition, the

shifting of assets between several funding media used for a single plan (such as between trusts, between annuity contracts, or between trusts and annuity contracts) is not a transfer of assets or liabilities.